

STATE OF MICHIGAN
COURT OF APPEALS

LARRY LOKUTA,

Plaintiff-Appellant,

v

WYANDOTTE BOAT CLUB, TOM DUDAS,
GARY ELLISON, RONALD GACIOCH,
EDMUND HEBDA, JAMES NICKSICH, PAUL
ORTO, DENNIS SCHMIDT, SALVATORE
SCLAFANI, DANIEL WLODKOWSKI,
CHARLES WYCOFF,

Defendants-Appellees.

UNPUBLISHED
February 15, 2005

No. 250882
Wayne Circuit Court
LC No. 02-203785-CZ

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8). We affirm.

This lawsuit arose from defendants' expulsion of plaintiff from the Wyandotte Boat Club (WBC). The individual defendants are members and directors of the WBC, a nonprofit corporation that exists for the purpose of promoting amateur rowing in Wyandotte. Plaintiff had been a member of the WBC for many years and brought this lawsuit alleging that he was wrongfully expelled. He alleged claims for illegal retaliation, breach of contract, and violations of the Michigan Nonprofit Corporation Act, MCL 450.2101 *et seq.* Plaintiff also requested declaratory relief, seeking an order declaring him a WBC member in good standing. The trial court granted defendants' motion for summary disposition and dismissed all claims pursuant to MCR 2.116(C)(8).

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the claim by the pleadings alone. *Jackson v Detroit Police Chief*, 201 Mich App 173, 174; 506 NW2d 251 (1993). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.*

I. Breach of Contract

In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991), citing *Detroit Trust Co v Struggles*, 289 Mich 595; 286 NW 844 (1939).

We first address the procedural issue. Plaintiff argues that the trial court was not entitled to consider the WBC's bylaws in conjunction with defendant's motion for summary disposition, since it was filed pursuant to MCR 2.116(C)(8), asserting failure to state a claim. It is true, as plaintiff argues, that in considering a motion under MCR 2.116(C)(8), the trial court is not permitted to consider documentary evidence and must only consider the pleadings. MCR 2.116(G)(5).¹ However, this procedural defect is not fatal because it is well settled that where summary disposition is granted under the wrong court rule, we will review the order under the correct rule. *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).

Because the trial court considered the by-laws, which were not attached to the complaint, it should have decided the motion under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Singerman v Muni Service Bureau, Inc*, 455 Mich 135, 138; 565 NW2d 383 (1997).

Plaintiff's breach of contract claim is based on allegations that defendants expelled him from the WBC because he pushed to institute reforms within that organization. But it is undisputed that the WBC's bylaws expressly allow for a member's removal, with or without cause. Because plaintiff could be removed from the boat club "with or without cause," plaintiff's allegations, accepted as true, do not establish a basis for concluding that his removal breached the alleged contract. Although the bylaws prescribe certain procedures that must be followed before a member may be removed, plaintiff's complaint does not allege that defendants failed to comply with any applicable procedural requirements. Therefore, plaintiff's breach of contract claim was properly dismissed.

II. Statutory Claims

The trial court dismissed plaintiff's statutory claims, concluding that the alleged statutory violations did not give rise to a private cause of action. Whether a statute provides a cause of action presents a question of statutory interpretation that this Court reviews de novo. *Long v Chelsea Community Hosp*, 219 Mich App 578, 581-582; 557 NW2d 157 (1996). A private cause of action will be found if a statute expressly creates a private cause of action, or a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. *Id.* at 583.

¹ Had the bylaws been attached to the pleadings, they would have been considered part of the pleadings. MCR 2.113(F)(2). Additionally, because the bylaws were in the possession of defendants, had plaintiff so stated, the bylaws would also have been part of the pleadings. *Id.*

We agree that MCL 450.2304(7) does not expressly create a cause of action for persons in plaintiff's position. Further, we will not infer a private right of action in favor of ejected members of nonprofit corporations because an adequate means of enforcement is available pursuant to MCL 450.2825. Accordingly, the trial court properly dismissed this statutory claim.

Plaintiff's reliance on MCL 450.2491 is also misplaced. That statute concerns situations in which a shareholder seeks to file suit on behalf of a corporation because the board refuses to do so; hence the requirement that a plaintiff allege, with particularity, efforts that were made to have the board file the action. Because plaintiff's complaint does not contain such allegations, his claim based on § 2491 necessarily fails. Rather than seeking to obtain a judgment in favor of the WBC because of a refusal on the part of the board to bring a lawsuit, plaintiff is seeking to retain his own membership.

III. Retaliation

The trial court properly dismissed plaintiff's retaliation claim. Plaintiff's complaint merely alleges that defendants retaliated against him because he advocated reform. This case involves only a private dispute lacking the kind of violation of a clearly mandated public policy that would support an action for retaliation. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695-696; 316 NW2d 710 (1982).

IV. Declaratory Relief

Plaintiff sought declaratory relief pursuant to MCR 2.605, which permits a court to declare the rights and other legal relations of an interested party seeking a declaratory judgment in a case of actual controversy within its jurisdiction. *Allstate Ins Co v Hayes*, 442 Mich 56, 65; 499 NW2d 743 (1993). Because plaintiff's complaint fails to allege any viable theory of relief, his claim for declaratory relief is similarly unenforceable as a matter of law. Accordingly, the trial court properly dismissed this claim as well.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens